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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 583

CECIL B. SANNER and MARY W. SANNER,
Petitioners

v.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The sole basis for granting summary judgment to respondent herein was that the Law of the State of Maryland is that a so-called charitable institution is immune from suit in tort.

The motion for summary judgment was opposed by petitioners on the ground that the doctrine of charitable immunity violates Article XIV, Section 1 of the Constitution of the United States and the concomitant guarantees of the Declaration of Rights of Maryland.

By its motion for summary judgment respondent admits the truth of the allegations of the complaint, but represents that as a matter of law summary judgment should be granted. *Furton v. City of Menasha,* (CCA 7th) 149 F.2d 945, cert. den'd 326 U.S. 771; *Zell v. American Seating Co.,* (CCA 2d) 138 F.2d 641, rev. oth. grds. 322 U.S. 709; *Poller v. Columbia Broadcasting System,* 368 U.S. 464.

Not only has respondent admitted the truth of the allegations by virtue of its motion for summary judgment, but it specifically admitted in its answer (R-App. 8-10) that (1) its charter permits it to "*sue and be sued*", (2) it contracted with the petitioners for the care and treatment of the female petitioner, (3) it undertook the full, complete and exclusive care of the female petitioner.

Thus, the issue squarely before this Court, an issue moreover never heretofore considered by this Court or any Federal Appellate Court, is whether or not the doctrine of charitable immunity impinges the guarantees of Article XIV, Section 1 of the Constitution of the United States.

Respondent's brief is misleading in that it attempts to create the impression that there has been binding determination of the constitutional question herein involved, when it states in its brief (Pages 1 & 2):

> "On the contrary, every court which has ruled on the question has held that the doctrine of charitable immunity does not violate the equal protection or due process clauses of the 14th Amendment. See, *Weeks v. Children's Hospital of Philadelphia,* 200 F.Supp. 77, (E.D. Pa. 1961); *Makar v. St. Nicholas Church,* 78 N.J. Super. 1, 187 A.2d 353; *Fournier v. Miriam Hospital,* 93 R.I. 299, 175 A.2d 298 (1961)."

Respondent's citation of the *Weeks case,* supra, is interesting in its misleading effect, for respondent fails to bring to the Court's attention that in 1965 the doctrine of charitable immunity was totally abrogated by Pennsylvania in the case of *Flagiello v. Penn. Hospital,* 417 Pa. 486, 208 A.2d 193. The *Weeks* case, supra, much like the instant

case was in the Federal Courts by virtue of diversity of citizenship and the District Court, like the District Court below, was merely following the pronouncement of state law *at that time.* Were the same case to come before the District Court in Pennsylvania today that Court would undoubtedly follow the present law that holds such charitable institutions liable for tort.

In discarding the doctrine of charitable immunity the court in the *Flagiello* case employed language consistent with the definition of due process as enunciated by this Court in the case of *Truax v. Corrigan,* 257 U.S. 312, 322, and language so similar to the provisions of Articles 19 and 23 of the Declaration of Rights of Maryland, to wit:

> "Of course the precedents here recalled do not justify a light and casual treatment of the doctrine of stare decisis, but they proclaim unequivocally that *where justice demands, reason dictates, equality enjoins and fair play decrees a change in judge-made law courts will not lack determination to establish the change.*" (Emphasis added)

Respondents would have this Court bound by the decisions in the cases of *Makar v. St. Nicholas Church,* 78 N.J. Super. 1, 187 A.2d 353 and *Fournier v. Miriam Hospital,* 93 R.I. 299, 175 A.2d 298, merely because these *state courts preserved a matter of local policy* in the face of an attack on Federal Constitutional grounds.

Conveniently, respondent ignores the holdings of this Court, that with regard to questions involving the Constitution of the United States and the rights protected thereunder, that this Court, *not a state court,* shall be the ultimate determinor of whether or not there has been an impingement of those rights. See petition at Page 8:

> "Federally asserted rights can not be discarded or ignored under the guise of local practice. *Davis v. Weschler,* 263 U.S. 22."
>
> "The ultimate determination of whether or not a federally asserted right is being denied by a state, either

through its judiciary or statutory enactment is for this Court to determine. *Titus v. Wallick,* 306 U.S. 282."

Respondent though asking this Court to be bound by the determination of the state court decisions above, deprecates petitioners' further citation of the cases of *Noel v. Menninger Foundation,* 175 Kan. 751, 267 P.2d 934; *Neely v. St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P.2d 155; and *Nicholson v. Good Samaritan Hospital,* 199 So. 344, because these cases rejected the doctrine of *charitable immunity* under the respective state constitutions.

The constitutions of these states assured *due process* to the individual, and these courts did not have to reach into the Federal Constitution to hold the doctrine of charitable immunity unconstitutional, as manifested by the quotation from the *Nicholson* case, supra; considering its Constitution, Declaration of Rights § 4:

> "That it would appear that the public policy of this state as enunciated by its Constitution, is to put justice 'by due course of law' above or before charity."

And, the following quotation from the case of *Noel v. Menninger Foundation,* supra, is particularly helpful in the consideration of *due process and equality:*

> "To exempt charitable and non-profit corporations from liability for their torts is plainly contrary to our constitutional guarantees, Bill of Rights § 18. *It gives certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens.*" (Emphasis added)

Interestingly, the Declaration of Rights or Bill of Rights of Florida and Kansas are virtually precisely similar to the language of guarantees of Articles 19 and 23 of the Declaration of Rights of Maryland. Yet never in the history of the charitable immunity doctrine, and numerous litigation, have the Courts of Maryland *ever looked to the guarantees under its Declaration of Rights.* Guarantees, which inci-

dentally, have by decisions of the Maryland Courts been held to be synonmous with the guarantees of *due process* of the Constitution of the United States. (See District Court Opinion R-App. 20).

Respondent conveniently totally ignores petitioners' position that the doctrine of charitable immunity is an invidious, arbitrary, and discriminatory classification of litigants without any reasonable basis for the purposes to be accomplished. The doctrine totally excludes damages *ex delicto* against respondent, but does not exclude damages *ex contractu* against respondent. The doctrine in Maryland being founded on the *trust fund theory*, the courts totally ignore the obvious fact that those trust funds can be just as easily invaded, diminished and depleted by damages *ex contractu* as damages *ex delicto*.

It is respectfully submitted that this type of classification of litigants is arbitrary and discriminatory contrary to the guarantees of Article XIV, Section 1 of the Constitution of the United States. *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 154, *Levy v. Louisiana*, 88 S. Ct. 1509.

Further, respondent totally ignores petitioners' arguments that the right to sue one for negligently inflicted injuries is a property right, as recognized by the District Court (R-App. 21), and that the denial of this right is a denial of due process. Or petitioners' argument that under the clearly pronounced exception of the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, that where a Federal Constitutional question is involved that Federal Courts, in diversity cases, *are not bound by state law*.

Corporate bodies, such as respondent, are legal fictions, creatures of the law, and can only act through their human instrumentalities. *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.Ed. 629.

Maryland has long subscribed to the doctrine of respondeat superior, that the corporate body is answerable for the torts of the corporate human instrumentalities *acting within*

the scope of their employment. The judicial decisions of Maryland show that corporations have been held liable for such torts as, *assault and battery, false imprisonment, false representations,*[1] *fraud,*[2] *libel,*[3] *malicious prosecution,*[4] *negligence*[5] and *slander.*[6]

Respondent's answer unequivocally admits the existence of a contract with petitioners, which contract was for the exclusive, complete and full care of female petitioner by respondent through the means of its agents, servants or employees. If the female petitioner was reduced to the total quadriplegia that she is through those agents, servants or employees acting *within the scope of their employment,* then under the doctrine of respondeat superior respondent is subject to an action in tort, and answerable for all proven proximate damages.

Due process is fully afforded respondent, since it has complete freedom and right to adduce evidence to carry the burden of the defenses it set forth in its answer (R-App. -10). If those agents, servants or employees were exceeding their authority then respondent is still afforded due process by proving such at a trial.

On the contrary, petitioners are denied due process, they are *totally barred* from any proof as against this respondent under the arbitrary doctrine of *charitable immunity.*

At page 6 of respondent's brief it is alleged that Article 48A § 480 is not properly before this Court. Respondent's

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[1] *Carter v. Howe Mach. Co.*, 51 Md. 290.

[2] *Purdum v. Edwards*, 141 A. 550, 155 Md. 178.

[3] *Philadlephia W & B.R. Co. v. Quigley*, 62 U.S. 202, 21 How. 202.

[4] *Carter v. Howe Mach. Co.*, 51 Md. 290.

[5] *United Laundries Co. v. Bradford*, 105 A. 303, 133 Md. 363.

[6] *Lewis v. Accel. Transportation Pony Exp. Inc.*, 148 A.2d 783, 219 Md. 252.

argument in this latter regard epitomizes contradiction. Respondent first states:

> "Article 48A § 480 is not strictly applicable to this case because it is undisputed that Respondent did not carry liability insurance at the time Petitioners' alleged cause of action arose."

In the very next sentence respondent contradicts itself by stating:

> "This section is relevant here only to indicate that the General Assembly of Maryland *has considered the question of charitable immunity and has approved the decisions of the Court of Appeals of Maryland,* adding only that a charitable institution would be liable to the extent of any liability insurance carried by it. Hence Petitioners' arguments that Article 48A § 480 is unconstitutional are not properly before this Court." (Emphasis added)

The Courts of Maryland have consistently held that Article 48A § 480 is binding upon them as a pronouncement of the General Assembly of Maryland. The Courts of Maryland have consistently used this pronouncement of the Legislature as the escape in refusing to abrogate the doctrine, claiming any change was the duty of the Legislature. *State of Md. for use of Cavanaugh v. Arundel Park Corp.*, 47 A.2d 863; *Gorman v. St. Paul Fire & Marine Ins. Co.*, 121 A.2d 812; *Howard v. Bishop Byrne Council Home, Inc.*, 238 A.2d 863.

Petitioners respectfully ask how can a law be a law and not a law, at one and the same time, as proposed by respondent?

The contradictory proposals of respondent with respect to Article 48A § 480 only serve to buttress petitioners' arguments of how vague, indefinite and indeterminate the language of Article 48A § 480 really is (See petition pages 14 and 15).

Further, respondent's statement with regard to Article 48A § 480 and respondent's lack of insurance, which was

of respondent's own choosing, perhaps to invoke sympathy for respondent, *poignantly emphasizes how completely the victim of respondent's negligences is wholly within the control of respondent under the doctrine of charitable immunity.*

It is respectfully submitted that this control, *coupled with a total denial of a right of action against respondent,* is not the constitutional concept of *due process* or *equal protection of the laws!*

By this doctrine, respondent and like institutions in those state adhering to the doctrine, can visit their negligence upon their victims with impunity. The doctrine permits the hiring of irresponsible financially judgment proof employees, permits negligent operations and supervision, and the doctrine is capable of permitting the most abject acts of perversion of the law, conspiracy and collusion with the promise of *total immunity*!

Obviously, vesting all control of the negligently injured victim's destiny wholly within the hands of the negligent charitable institution, with no recourse to the courts for redress of any wrongs, is a denial of the guarantees of Article XIV, Section 1, of the Constitution of the United States.

CONCLUSION

For these additional reasons the judgment below should be reviewed on a writ of certiorari.

Respectfully submitted

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